

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2022-155-E

IN RE:)	
)	
Mark Baker,)	<u>DUKE ENERGY PROGRESS, LLC’S ANSWER AND MOTION TO DISMISS THE COMPLAINT</u>
Complainant,)	
v.)	
)	
Duke Energy Progress, LLC,)	
Respondent.)	
_____)	

Pursuant to S.C. Code Ann. § 58-27-1990, S.C. Code Ann. Regs. 103-829 and 103-352, and applicable South Carolina law, Respondent Duke Energy Progress, LLC (“DEP” or the “Company”) hereby answers and moves the Public Service Commission of South Carolina (“Commission”) to dismiss Complainant Mark Baker’s (“Complainant”) Complaint in this matter. As a threshold matter, Complainant lacks standing. Further, the Complaint fails to allege any violation of a Commission-jurisdictional statute, rule, regulation, or order—no such violation has occurred—and does not request any specific relief. The Company also requests that the Commission stay all deadlines and hold the hearing in abeyance until this motion is resolved.

BACKGROUND

Upon information and belief, Complainant—who is not a DEP customer—lives in Oregon and is president of the Soft Lights Foundation. Complainant generally claims that people have complained about Duke Energy’ alleged use of LED lights. But Complainant is not a member of the South Carolina Bar, and he does not purport to represent any DEP customers in South Carolina. *Cf.* S.C. Code Ann. Regs. 103-805(B) (“Except as otherwise provided in S.C. Code Ann. Regs.

103-805(E), any entity including, but not limited to, a corporation, partnership, limited liability company, or professional association, must be represented by an attorney admitted to practice law in South Carolina, or an attorney possessing a Limited Certificate of Admission pursuant to Rule 405, SCACR.”). Nor could he. *See* S.C. Code Ann. Regs. 103-805(A) (“No one shall be permitted to represent a party where such representation would constitute the unauthorized practice of law.”).

Nevertheless, after the Office of Regulatory Staff (“ORS”) Consumer Services Department closed his case, Complainant filed a Complaint with the Commission on April 27, 2022. When the Commission’s staff asked whether Complainant was filing his Complaint against DEP or Duke Energy Carolinas, LLC (DEC), Complainant said he was “unclear as to your question, because the toxicity issue of LED streetlights is not bounded by any particular corporate structure. If you need me to choose a particular entity, I choose Duke Energy Progress.”

Shortly thereafter, on May 3, 2022, ORS gave notice of its intent not to participate in this proceeding. On May 10, 2022, the Company requested an amended procedural schedule that would require Complainant to file his direct testimony first given the vagueness of the Complaint. Within hours, Complainant emailed a letter to the Commission acknowledging he has nothing to present. Instead, Complainant said the Company had to come forward with evidence showing LED lights are safe. According to Complainant, the Complaint “is a simple question to Duke Energy Progress: Do the LED streetlights that Duke has installed provide the same quality of service as the previous High-Pressure Sodium streetlights?” In other words, it is no complaint at all and certainly not a customer one.

This matter thus comes before the Commission on the Company’s motion to dismiss the Complaint because Complainant lacks standing to maintain this action, and the Complaint is without merit.

ANSWER AND ARGUMENT

DEP denies all allegations contained in the Complaint not otherwise expressly admitted herein. Further, contrary to Complainant's letter, in which he states that "Duke implies that LED lights, at least in some circumstances, are unsafe," DEP *never* implied that LED lights are not safe in any filing with this Commission. Before addressing the legal insufficiency of the Complaint, however, the Company must address a more fundamental problem—Complainant plainly lacks standing to maintain this action.

Before any action may be maintained, a justiciable controversy must exist. *Byrd v. Irmo High Sch.*, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996). "A justiciable controversy is a real and substantial controversy appropriate for judicial determination, as opposed to a dispute or difference of a contingent, hypothetical[,] or abstract character." *Sloan v. Greenville Cty.*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). As the court of appeals has recognized, "[t]he concept of justiciability encompasses the doctrines of ripeness, mootness, and standing." *Id.* at 547, 590 S.E.2d at 346. "Standing to sue is a fundamental requirement to instituting an action." *Joytime Distribs. & Amusement Co., Inc. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999).

Here, Complainant has not cited—and cannot cite—a statute that confers standing upon him to bring this action. *See Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013) ("Statutory standing exists, as its name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation."). Complainant, then, must satisfy the requirements of bringing this action under the rubric of constitutional standing. *See Youngblood*, 402 S.C. at 317, 741 S.E.2d at 518 ("When no statute confers standing, the elements of constitutional standing must be met."). He cannot.

“To possess constitutional standing, first, a party must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest.” *Id.*; see also *ATC S., Inc.*, 380 S.C. at 195, 669 S.E.2d at 339 (asserting that an injury-in-fact is “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not conjectural or hypothetical’” (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))). “Moreover, the injury must be of a personal nature to the party bringing the action, not merely of a general nature which is common to all members of the public.” *Joytime Distribs. & Amusement Co.*, 338 S.C. at 639–40, 528 S.E.2d at 650. “Second, a causal connection must exist between the injury and the challenged conduct.” *Youngblood*, 402 S.C. at 317–18, 741 S.E.2d at 518. “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.” *ATC S., Inc.*, 380 S.C. at 195, 669 S.E.2d at 339 (quoting *Lujan*, 504 U.S. at 561).

From the face of the Complaint, Complainant cannot meet the elements for constitutional standing. First and foremost, he has not suffered an injury-in-fact. Thus, as in *ATC South, Inc.*, the Commission “need go no further than the initial requirement of a concrete and particularized injury.” 380 S.C. at 196, 669 S.E.2d at 339. After all, it is well settled that “a private person may not invoke the judicial power . . . unless he has sustained, or is in immediate danger of sustaining, prejudice therefrom.” *Id.* (quoting *Evins v. Richland Cty. Historic Pres. Comm’n*, 341 S.C. 15, 21, 532 S.E.2d 876, 879 (2000)).

Even if Complainant did allege some abstract concern about LED streetlights, Complainant and his out-of-state organization have failed to assert an injury-in-fact, much less show the personal nature of the alleged injury. See *Joytime Distribs. & Amusement Co.*, 338 S.C. at 639–40, 528 S.E.2d at 650. What is more, Complainant’s implicitly alleged injury—to the extent one

exists—would be no different than that of the general public. *See id.* at 198, 669 S.E.2d at 341 (noting the injury to the plaintiff was “common to all property owners,” and “[t]his feature of commonality defeats the constitutional requirement of a concrete and particularized injury” because one “lacks standing when he ‘suffers in some indefinite way in common with people generally’” (quoting *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923))). Accordingly, he lacks standing to bring this suit from afar in his own right. And Complainant certainly cannot represent South Carolina customers. *See* S.C. Code Ann. Regs. 103-805(A)–(B) (stating, in relevant part, an entity “must be represented by an attorney admitted to practice law in South Carolina” and preventing someone from “represent[ing] a party where such representation would constitute the unauthorized practice of law”). Further, given the absence of any request for relief, it is questionable how, if at all, the Commission could redress this generalized inquiry into the safety of LED lights. *See ATC S., Inc.*, 380 S.C. at 195, 669 S.E.2d at 339 (stating “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision’” (quoting *Lujan*, 504 U.S. at 561))).

Turning to the merits, the Complaint lacks sufficient specificity—as well as factual or legal support—and fails to allege any violation of an act, rule, regulation, order, tariff, or contract. It is axiomatic that complaints must include “[a] concise and cogent statement of the factual situation surrounding the complaint. If a complaint relates to an act, rule, regulation or order administered or issued by the Commission, or to a provision in a tariff or contract on file with the Commission, the act, rule, regulation, order, tariff or contract should be specifically identified in the complaint.” S.C. Code Ann. Regs. 103-824(A)(3). Here, by not specifying any act, rule, regulation, or order the Company allegedly violated, Complainant failed to comply with the requirements of 103-824. And it is unclear what relief Complainant is requesting from the Commission. *See* S.C. Code Ann.

Regs. 103-824(A)(4) (requiring a complaint to include “[a] concise statement of the nature of the relief sought”). After all, Complainant is not even a DEP customer. Indeed, this appears to be a fishing expedition from an Oregon company generally interested in streetlights.

Pursuant to S.C. Code Ann. § 58-27-1990, a hearing is not necessary in the public interest or for the protection of substantial rights. That ORS chose not to participate in this proceeding supports this point. *See* S.C. Code Ann. § 58-4-10 (stating ORS “represent[s] the public interest of South Carolina before the [C]ommission”).

CONCLUSION

In sum, the Commission should dismiss the Complaint with prejudice. Complainant lacks standing to bring this action on behalf of himself or anyone else. On the merits, the Complaint fails to adequately allege that DEP violated any Commission jurisdictional statute, rule, regulation, or order. Nor does it seek any specific relief. Instead, the Complaint simply poses questions about LED streetlights. While that may make for an interesting conversation, it is not a proper use of the customer complaint procedures set forth in the Commission’s rules and regulations. Dismissal is therefore warranted.

DEP requests that the Commission stay all deadlines for all parties, including those applicable to any purported discovery that was or may be propounded under S.C. Code Ann. Regs. 103-833, and hold the hearing in abeyance pending resolution of this motion. DEP further requests such other relief as the Commission deems just and proper.

Respectfully submitted this 25th day of May 2022.

Katie M. Brown, Counsel
Duke Energy Carolinas, LLC
40 West Broad Street, Suite 690
Greenville, SC 29601
Telephone (864) 370-5045
katie.brown2@duke-energy.com

and

/s/Vordman Carlisle Traywick, III
Vordman Carlisle Traywick, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
ltraywick@robinsongray.com

Counsel for Duke Energy Progress, LLC

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2022-155-E**

Mark Baker,

Complainant/Petitioner,

v.

Duke Energy Progress, LLC,

Defendant/Respondent.

CERTIFICATE OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **Answer and Motion to Dismiss the Complaint on behalf of Duke Energy Progress, LLC** in the foregoing matter by electronic mail and/or by placing a copy of same in the U.S. Mail addressed as follows:

Mark Baker
mbaker@softlights.org

Donna L. Rhaney, Counsel
SC Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
drhaney@ors.sc.gov

Sandra Moser, Staff Counsel
Public Service Commission
101 Executive Center Drive, Suite 100
Columbia, SC 29210
Sandra.Moser@psc.sc.gov

Carri Grube Lybarker, Consumer Advocate
Roger P. Hall, Counsel
SC Department of Consumer Affairs
P.O. Box 5757
Columbia, SC 29250
clybarker@scconsumer.gov
Rhall@scconsumer.gov

Public Service Commission of South Carolina
Legal Filings
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210
legalfilings@psc.sc.gov

Dated at Columbia, South Carolina this 25th day of May 2022.

